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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALVINO CAMPOS et al., Plaintiffs and Appellants, v. SUPER CENTER CONCEPTS, INC., Defendant and Respondent.	B234264 (Los Angeles County Super. Ct. No. BC426413)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Wang, Shin & Associates, Christian Shin, and Willie Wang, for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Esther P. Holm, for Defendant and Respondent.

Billie Padilla fell while pulling out a jammed shopping cart at the supermarket and died after surgery for a fractured femur. Her husband, Alvino Campos, and other family members sued the market, as well as various health care providers, for wrongful death and related torts. The trial court granted the market's motion for summary judgment, concluding Campos could not establish the market had breached its duty of care. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Padilla's Fall and Subsequent Death*

On August 21, 2008 Padilla was walking with Campos toward the entrance to Superior Super Warehouse in Long Beach and stopped to remove a shopping cart from a row of carts in the parking lot. As Campos walked ahead, he heard Padilla scream, "I fell." Campos turned around and saw Padilla lying on the ground six or seven feet from an overturned cart. When Campos went to her, Padilla said, "The baskets were stuck, and I went down." Padilla did not describe any other details of the accident and did not indicate anything was wrong with the shopping cart. Campos did not notice anything wrong either. There were no witnesses to the incident.

Paramedics arrived on the scene and transported Padilla to Long Beach Memorial Medical Center. The following day, she was transferred to a Kaiser medical facility and underwent surgery for a fracture of her right femur. On August 23, 2008, while still a patient at Kaiser, Padilla died.

2. *Campos's Complaint and Superior's Motion for Summary Judgment*

On November 19, 2009 Campos filed a lawsuit against Super Center Concepts, Inc., the owner of Superior Super Warehouse (Superior),[1] alleging four causes of action: (1) wrongful death, (2) loss of consortium, (3) premises liability and (4) general

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[1] Campos sued on his own behalf and as guardian ad litem for his and Padilla's child, Nicole Marina Campos. The other named plaintiff was Beliana Padilla Kapusta (Padilla's adult daughter), who sued on her own behalf and as guardian ad litem for two children under Padilla's care, Matthew Joseph Aguilar and Ashley Nicole Aguilar. For convenience, we refer to plaintiffs collectively as Campos.

negligence.[2] The complaint alleged Padilla had died as a proximate result of Superior's failure to properly maintain the shopping carts. The complaint also alleged Superior owed Padilla an affirmative duty to ensure her safety and failed to exercise ordinary care in managing the premises, exposing her to an unreasonable risk of harm.

On January 26, 2011 Superior moved for summary judgment. In support of its motion Superior submitted Campos's deposition and argued Campos had acknowledged there were no known witnesses to Padilla's fall and admitted he had no evidence the shopping carts were defective or dangerous or any condition on the property had created an unreasonable risk of harm. Superior further argued there was no evidence it knew or should have known about a dangerous condition at the market and, therefore, it had not breached its duty to maintain reasonably safe premises.

In his opposition papers Campos argued, because he and Padilla had never encountered problems with the shopping carts in their previous visits to Superior, the doctrine of res ipsa loquitur permitted an inference of Superior's negligence. Application of this doctrine, Campos contended, shifted the burden to Superior to produce evidence it had not been negligent, which Superior failed to do.

3. *The Trial Court's Order Granting Summary Judgment*

Prior to the hearing on Superior's motion, the court issued a tentative ruling to grant summary judgment, indicating the res ipsa loquitur doctrine did not apply. The tentative ruling explained none of the requirements for application of res ipsa loquitur was present[3] and the only reasonable inference was Padilla "pulled on the cart to free it, stumbled when it finally freed, and she took the cart down with her while she fell."

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[2] The complaint also alleged a cause of action for medical malpractice against the hospitals and 18 doctors and health care providers. That claim was subsequently dismissed.

[3] A res ipsa loquitur instruction, which allows the jury to presume negligence and shifts the burden to the defendant to show it was not negligent, is warranted only when, among other things, there is substantial evidence from which a jury could reasonably conclude the accident could not have happened at all but for the defendant's negligence. (*Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 442-443 ["[a]ll of the cases hold,

After hearing argument, the court granted the motion. It found Superior had met its initial burden by demonstrating Campos had no evidence to establish Superior had breached its duty of care, an essential element of his premises liability and negligence causes of action. During the hearing itself, in addition to the issue of breach, the court commented liability should not extend to Superior because it is not "reasonably foreseeable that somebody is going to, in the process of unsticking two shopping carts that happen to have jammed together, is going to fall and die as [Padilla] did."[4]

DISCUSSION

1. *Standard of Review*

Summary judgment is properly granted when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the

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in effect, that it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent"].) "Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.'" (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 129; see generally *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826.)

[4] On appeal Campos takes issue with the trial court's observation and contends foreseeability is a factual issue for the jury. However, notwithstanding its comments during oral argument, the trial court did not purport to decide the issue of foreseeability; its decision granting summary judgment was based solely on the lack of a triable issue of material fact on the element of breach of duty.

defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) Alternatively, the defendant may present evidence to "show[] that one or more elements of the cause of action . . . cannot be established" by the plaintiff. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar,* at p. 853.) A defendant "has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, at p. 854; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 ["[T]he defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.'"].) Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action or defense. (Code Civ. Proc. § 437, subd. (p)(2); *Aguilar,* at p. 849.)

On review of an order granting summary judgment, we view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 284.)

2. *The Trial Court Properly Granted Summary Judgment*

To prevail on his causes of action for negligence and premises liability, Campos must establish that Superior owed Padilla a duty, that it breached the duty, and that the breach was a proximate cause of Padilla's death. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) A store owner owes its customers a duty of care to keep the premises reasonably safe. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) The exercise of ordinary care may require the owner to take precautions to safeguard against a dangerous condition; but "[b]ecause the owner is not the insurer of the visitor's personal

safety [citation], the owner's actual or constructive knowledge of the dangerous condition is key to establishing its liability." (*Id.* at p. 1206)

a. *Superior met its initial burden on the element of breach of duty*

Citing Campos's discovery responses, Superior contended Campos could not establish the element of breach of duty required for his premises liability and negligence causes of action. Campos conceded he possessed no evidence of a dangerous or defective shopping cart or any other condition on the premises presenting an unreasonable risk of harm. (See *Aguilar, supra*, 25 Cal.4th at p. 855 [defendant can show plaintiff's lack of evidence "through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing"].) Campos also admitted no one had witnessed Padilla's fall. Thus, Superior met its initial burden by showing Campos did not possess, and could not reasonably obtain, evidence of any negligence (breach of duty) by Superior.

b. *Campos did not introduce evidence establishing a breach of duty by Superior*

In opposition to Superior's initial showing of an absence of evidence of breach of duty, Campos insisted Padilla's statement, "The baskets were stuck, and I went down," was evidence of a dangerous condition on Superior's premises.[5] However, there is no evidentiary basis for Campos's claim that two shopping carts stuck together, without more, creates an unreasonable risk of harm or otherwise constitutes a dangerous condition. (See *Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 448 ["the basic principle to be followed in [situations where a dangerous condition may occur] is that the owner must use the care required of a reasonably prudent man acting under the same circumstances"].) Moreover, even if we were to consider jammed shopping carts a dangerous condition, Campos presented no evidence Superior was on notice of the condition. (See *Ortega v. Kmart Corp., supra,* 26 Cal.4th at p. 1206; see also *Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 ["[T]he owner must have either actual or

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[5] Campos has abandoned on appeal the argument the doctrine of res ipsa loquitor applies to Padilla's accident.

constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition . . . . [N]egligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or a man of ordinary prudence should have discovered it."].) To the contrary, Campos himself testified the shopping carts normally were not stuck or jammed together at the market. He presented no evidence indicating how long these two carts had been stuck or suggesting Superior should have been aware of the situation.

Given the complete lack of evidence of any negligence by Superior, the trial court properly granted its motion for summary judgment.

DISPOSITION

The judgment is affirmed. Super Center Concepts, Inc. is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.